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No. 81 6092

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LOUISE E. HALEY,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN J. CLEARY
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Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the failure of a narcotics officer to inform a D.E.A. Agent then seeking a search warrant to search a residence that his informant had advised him that the half-pound of cocaine was not at the residence but was two blocks and three minutes away constituted an intentional or reckless omission of information from the Magistrate who issued the warrant?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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LOUISE E. HALEY,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Louise E. Haley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 4 September 1981.

OPINION BELOW

The Court of Appeals entered its Memorandum affirming the convictions of Petitioner on 4 September 1981. A copy of the Memorandum, which is not to be reported, is attached as Appendix "A". An Order was entered on 12 November 1981 denying a petition for rehearing. A copy of the 12 November 1981 Order is attached hereto as Appendix "B".

JURISDICTION

On 4 September 1981 the Court of Appeals entered judgment affirming the convictions of Petitioner for conspiring to possess a controlled substance and the possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 846 and 841(a)

(1). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). [1]

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by Oath or affirmation....

STATEMENT OF THE CASE

At approximately 8:20 on the evening of 16 April 1980 twelve to sixteen officers executed a search warrant at the 1137 Woodlake Drive residence in Cardiff by the Sea, California. [R.T. 65] [2] The warrant had been issued by the United States Magistrate at four or five o'clock that afternoon pursuant to the affidavit of Special Agent Bryan L. Cook of the Drug Enforcement Administration. [R.T. 226] The affidavit of DEA Agent Cook did not include the information provided Agent Berstler by petitioner herein at 10:15 that morning that the cocaine was "two blocks from the house" or the information provided by petitioner fifteen minutes thereafter to the same Agent Berstler that the half-pound of cocaine was "three minutes" from the home. [C.R. 30]

At the 9 June 1980 motion proceedings Agent Berstler testified that the information provided him by petitioner that the cocaine was not at the residence "was not known to (him) until after the warrant had been issued" and "was told to (him) on the last phone call between (him) and Miss Haley." [R.T. 11] The last telephone call occurred at approximately 5:00 p.m., and the search warrant was issued at four or five o'clock. [C.R. 30, R.T. 226]

When called by the Government, Agent Berstler changed his prior testimony and admitted that petitioner had provided him with the information at 10:30 a.m. but stated that he did not provide Agent Cook with the information that the cocaine was "three minutes"

1/ Other petitioners involved herein are BRENT E. BOWMAN and FLANN P. MAGUIRE

2/ "R.T." refers to the Reporters Transcript and "C.R." to the Clerk's Record on appeal.

and "two blocks" from the house for which DEA Agent Cook was seeking the search warrant. [R.T. 109-112] However, Agent Cook testified and Agent Berstler admitted that there had been telephonic communication between the two Agents within an hour of the issuance of the search warrant. [R.T. 201-225]

The trial court held that the information had not been withheld deliverately. [R.T. 284-289] The court below found that the decision of the district court was not clearly erroneous. [App. A] Thereafter, on 12 November 1981, petition for rehearing was denied: [App. B]

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit is in conflict with that of the Eighth Circuit in United States v. Stratton, 453 F.2d 36 (8th Cir. 1972) holding that the knowledge of one officer is the knowledge of all involved in the investigation and debilitates the rationale of Frank v. Delaware, 438 U.S. 154 (1978).

As this Court stated in United States v. Ventresca, 380 U.S. 102, 108 (1965), the magistrate is required to render a judgment based on the common-sense reading of the entire affidavit requesting the issuance of the search warrant. Here the magistrate was denied such common-sense reading since the affidavit was devoid of a most important piece of information, namely, that petitioner Haley, the chief source of information of Agent Berstler, had informed him that the cocaine was "two blocks" and "three minutes" from the dwelling for which the search warrant was being sought. Simple logic dictates that no magistrate would issue a warrant to search a dwelling for cocaine where the affidavit of the DEA Agent set forth that their informant had stated a few hours earlier that the cocaine was "two blocks" and "three minutes" from the dwelling.

Likewise, it borders on absurdity to accept that experienced DEA Agents would appear before a Magistrate seeking a search warrant for a dwelling for cocaine and include in the supporting affidavit that their informant had stated that the contraband sought was "two blocks" and "three minutes" from the dwelling for which the search warrant was sought. That absurdity was removed by the simple proces

of non-inclusion in the affidavit of Agent Cook.

The record unequivocally reflects that Agent Berstler tried to conceal the fact that he had been provided the information prior to the issuance of the search by testifying falsely. [R.T. 11] He changed that testimony when called by the Government later. He then admitted that he had received the "two blocks" and "three minutes" from the house from petitioner Haley during his 10:30 a.m. telephone conversation with her and that the warrant was not issued until four or five that afternoon. [R.T. 109-112] Here also Agent Cook telephoned Agent Berstler from the office of the United States Attorney prior to his seeking the issuance of the search warrant. [R.T. 225]

The best that can be said for Agent Berstler is that he developed a bad memory, except to his absolute denial that he had failed to tell Agent Cook that the information stated the cocaine was "two blocks" and "three minutes" from the dwelling with no intent to deceive the magistrate and cause him to issue the search warrant. Of course, the magistrate was in fact deceived. Perhaps the magistrate would have issued the search warrant had he been informed that the cocaine sought was "two blocks" and "three minutes" from the dwelling. That opportunity was denied the magistrate since essential facts were not presented prior to the issuance of the search warrant.

In United States v. Ventresca, supra, 380 U.S. at 111 (1965), this Court held that the observations of fellow officers engaged in a common investigation is a "reliable basis for a warrant applied for by one of their number." That same principle should be applied to information known to one of their number but not conveyed to the officer seeking the search warrant.

As stated by the Eighth Circuit:

> "We think the knowledge of one officer is the knowledge of all and that in the operation of an investigative or police agency the collective knowledge and the available objective facts are the criteria to be used in assessing probable cause.... The officers involved were working in close concert with each other and the knowledge of one of them was the knowledge of all." United States v. Stratton, 453 F.2d 36 at 37 (8th Cir. 1972).

This Court has held prosecuting attorneys to the same test. See, Giglio v. United States, 405 U.S. 150 (1972), where this Court disposed of nondisclosure "whether... a result of negligence or design" by requiring that relevant information be communicated to

prosecutor involved in the case. 405 U.S. at 154. See also, Santobello v. New York, 404 U.S. 257 (1971).

To permit the withholding of information, inadvertently or otherwise, is to debilitate the rationale of Franks v. Delaware, 438 U.S. 154 (1978). Under the facts of this case the failure to disclose the information to Agent Cook should be deemed a reckless disregard or the information not disclosed should be deemed within the collective knowledge of all Agents, including Agent Cook who provided the affidavit upon which the search warrant was issued.

CONCLUSION

For the foregoing reasons, petitioner Louise E. Haley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit to resolve the questions presented herein.

Respectfully submitted,

DATED: 23 December 1981.

JOHN J. CLEARY
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San Diego, California 92101
Telephone: (714) 234-8467

Attorneys for Petitioner Louise E. Haley

FILED

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS SEP 4 1981

FOR THE NINTH CIRCUIT

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRENT E. BOWMAN, Defendant-Appellant.	No. 80-1809 D.C. No. CR 80-262-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUISE R. ELLEY, Defendant-Appellant.	No. 80-1814 D.C. No. CR 80-262-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FLANN F. MAGUIRE, Defendant-Appellant.	No. 80-1815 D.C. NO. CR 80-262-2 MEMORANDUM

On Appeal from the United States District Court
for the Southern District of California
The Honorable Gordon Thompson, Jr., District Judge, Presiding
Argued and submitted August 5, 1981

Before: ANDERSON and CHAMBERS, Circuit Judges, and BILBY,* District Judge.

SUFFICIENCY OF THE AFFIDAVIT

Appellants have challenged the sufficiency of the affidavit relied upon for issuance of the search warrant. They argue that material information was intentionally or recklessly withheld which, if included, would have destroyed probable cause. The district court found that the information was not intentionally or recklessly omitted. We have

*The Honorable Richard M. Bilby, United States District Judge for the District of Arizona, sitting by designation.

reviewed the record and do not find the district court's determination on this issue to have been clearly erroneous. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); United States v. Lefkowitz, 618 F.2d 1313 (9th Cir.), cert. denied, ____U.S.____, 101 S.Ct. 86, 66 L.Ed.2d 27 (1980); United States v. Wysong, 528 F.2d 345, 348 (9th Cir. 1976).

Appellant Bowman also argues that information contained in paragraph 12 of the affidavit, regarding his prior arrest in Texas, should have been deleted because the arrest was based upon illegally-seized evidence. He further contends that without this information the affidavit would not have established probable cause. Where, as here, the district court made no specific finding on this issue, we will uphold the district court's denial of appellant's motion to suppress if a reasonable view of the evidence will sustain it. United States v. Miner, 484 F.2d 1075, 1077 (9th Cir. 1973). Since the affidavit contained sufficient independently derived information apart from paragraph 12, we find ample support for the district court's denial of the motion to suppress.[1/]

COMPLIANCE WITH 18 U.S.C. § 3109

Appellants contend that the knock and announcement requirements of 18 U.S.C. § 3109 were violated by the officers' entries at the front and side doors of the unit searched. The district court found that the officers who entered at the front door properly knocked and announced their authority and purpose as required. The district court further found that exigent circumstances justified the side door entry. The findings of the district court on

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1/ We express no view as to the legality of Bowman's prior Texas arrest.

these issues are not clearly erroneous. United States v. Flickinger, 573 F.2d 1349, 1357 (9th Cir.), cert. denied, 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed.2d 132 (1978); United States v. Wysong, 528 F.2d 345, 348 (9th Cir. 1976).

Because of the above dispositions, it is unnecessary for us to reach the issue of standing to challenge the legality of the search as raised by the parties to this appeal.

We have considered all other contentions raised by appellants and find them to be without merit.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BRENT E. BOWMAN, Defendant-Appellant.	Nos. 80-1809 D.C. No. CR 80-262-3
UNITED STATES OF AMERICA Plaintiff-Appellee, vs. LOUISE R. HALEY, Defendant-Appellant.	Nos. 80-1814 D.C. no. CR 80-262-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FLANN P. MAGUIRE, Defendant-Appellant.	Nos. 80-1815 D.C. No. CR 80-262-2

O R D E R

Before: ANDERSON and CHAMBERS, Circuit Judges, and BILBY,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Richard M. Bilby, United States District Judge for the District of Arizona, sitting by designation.

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PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 46 of this Court, the Petitioner, Louise E. Haley, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

DATED: 23 December 1981.

JOHN J. CLEARY
EUGENE G. IREDALE
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Telephone: (714) 234-8467

Attorneys for Petitioner

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OCTOBER TERM, 1981

No. 81 6092

LOUISE E. HALEY,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

VALERIE JOSLIN, after first being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court she served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT on counsel for Respondent by enclosing a copy thereof in an envelope priority postage prepaid, addressed to:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

and depositing same in the United States mails at San Diego, California, on 23 December 1981.

Valerie Joslin
Valerie Joslin, Affiant

Subscribed and Sworn to before me this 23rd Day of December 1981.

Sonia D. Fernandez
Sonia D. Fernandez, Notary Public in and for said County and State.

OFFICIAL SEAL
SONIA D. FERNANDEZ
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Exp. [illegible] 1985

FILED
JAN 22 1982
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81 6092

LOUISE E. H. LEY,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

AFFIDAVIT OF COUNSEL PURSUANT TO RULE 28.2 OF THE RULES OF THE SUPREME COURT.

Eugene G. Iredale being duly sworn, deposes and states:

1. I am an attorney authorized to practice law in the State of California and in the United States District Court for the Southern District of California, as well as before the United States Court of Appeals for the Ninth Circuit. In addition I am a member of the bar of the Supreme Court of the United States.

2. Pursuant to Rule 28.2 of the rules of this court, I am filing the instant affidavit.

3. In the case of Louise E. Haley, Petitioner, v. United States of America, Respondent, I prepared a motion for leave to proceed in forma pauperis as well as a petition for a writ of certiorari to the United States Court of Appeals

for the Ninth Circuit. On 23 December 1981, an original and nine copies of the motion for leave to proceed in forma pauperis and petition for writ of certiorari were mailed from San Diego, California, to the United States Supreme Court, with first class postage prepaid and properly addressed to the clerk of the court. On that same date a copy of the motion for leave to proceed in forma pauperis and petition for writ of certiorari were mailed to the Solicitor General's Office. My secretary at the time, Valerie Joslin, mailed both sets of documents.

4. The Ninth Circuit Court of Appeals denied the petition for rehearing filed on behalf of Ms. Haley on 12 November 1981. Thus, the mailing took place on 23 December 1981 and was well within the permitted time for filing a petition for writ of certiorari.

5. I have spoken on this date with Ms. Virginia Bolling of the Solicitor General's Office. Ms. Bolling informed me that the Solicitor General's Office received a copy of the petition for writ of certiorari on 30 December 1981. I have been informed, however, that the Clerk's office of this Court did not receive the copies of the petition that were mailed on 23 December 1981.

6. I respectfully request in view of the fact that the petition was timely mailed, and the Solicitor General's Office did receive a copy of the petition on 30 December 1981, that the court docket the petition for writ of certiorari.

Respectfully submitted,

Dated: 21 January 1982

Eugene G. Iredale

EUGENE G. IREDALE, Affiant
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone: (714) 234-8467

Attorneys for Petitioner

Subscribed and Sworn to Before Me
this 21st day of January 1982.

Terri L. Westerbeck

Notary in and For Said County and State

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

LOUISE D. HALEY,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

TERRI WESTERBECK CORTEZ, after first being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court she served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT and AFFIDAVIT OF COUNSEL PURSUANT TO RULE 28.2 OF THE RULES OF THE SUPREME COURT on counsel for Respondent by enclosing a copy thereof in an envelope priority postage prepaid, addressed to:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at San Diego, California, on 21 January 1982.

Terri Westerbeck Cortez
Terri Westerbeck Cortez
Affiant

Subscribed and Sworn to Before Me this 21st Day of January 1982.

Alfred Lozano
Notary in and for Said County and State.